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CHARLES ELMORE

IN THE

Supreme Court of the United States

October Term, 1936.

EDWARD T. BLAIR,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

No. 247

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF.

JOHN E. HUGHES,
First National Bank Bldg.,
Chicago, Illinois,
Amicus Curiae.

U. S. Law Printing Company, 2817 N. Halsted St., Chicago, Ill.

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MOTION.

Comes now the undersigned and moves for leave to file instanter the annexed brief as *Amicus Curiae.*

A letter from counsel for the petitioner and a letter from the Solicitor General consenting to the filing of this brief has been filed with the Clerk.

JOHN E. HUGHES,
First National Bank Bldg.,
Chicago, Illinois.

BRIEF AMICUS CURIAE.

May It Please The Court:

The writ should be granted in this case for the following reasons:

(1) In *Hoeper v. Tax Commission of Wisconsin, 284 U. S. 206*, this Court held that one person could not be taxed upon the income of another even in a case where the legislature had so expressly enacted. By final decree of the Illinois Court having jurisdiction over the property and the parties, the income upon which the petitioner has been taxed in this case is not and was not his income but the income of others who have received it and paid tax thereon. The Federal Revenue Act does not attempt to tax one taxpayer on the income of another in a case such as the one at bar.

(2) The decision in the case at bar is directly in conflict with the decision of the Circuit Court of Appeals for the Second Circuit in *Commissioner v. Field, 42 F. (2d) 820*. In both cases the trustees and the property in trust were located at Chicago, Illinois. In both cases a beneficiary entitled to income from a trust fund under the will of his ancestor, assigned it to another prior to its receipt. In one case the beneficiary has been held taxable on the income so assigned, while in the other he has not. In the case at bar the Court below makes no attempt to distinguish the *Field case* but state it is analogous to the case at bar.

(3) The question is of great importance in the law of income tax. The cases dealing with it in the lower Courts

are in great confusion. In *Volume II of the Law of Federal Income Taxation, Paul & Mertens, Section 15:04,* the authors say:

> "It must be confessed that the decisions bearing upon this subject are difficult to analyze and they are often not reconcilable."

In its opinion in the case at bar the Circuit Court of Appeals says:

> "The Supreme Court has not had occasion to pass upon the identical question."

(4) If the statute purported to tax petitioner on income which never at any time during the taxable year belonged to petitioner but was the income of his children it would be unconstitutional under the rule of *Hoeper v. Tax Commission of Wisconsin, 284 U. S. 206,* but the statute on the contrary provides for the taxation of this income to the beneficiaries, who under the instruments executed prior to the time the income arose are the petitioner's children, and not the petitioner. (Compare *Freuler v. Helvering, 291 U. S. 35.)* They are the persons to whom the Trustees must pay it under the Illinois Court's decree. They cannot pay it to petitioner.

ARGUMENT.

In construing the trust in the case at bar the Appellate Court of Illinois in *Blair v. Linn, 274 Ill. App. 23,* said:

> "This appeal presents the question whether Edward Tyler Blair, a defendant, could assign a portion of the trust income devised to him by his father's will *before he received it.*" (Italics ours.)

The Court answered the question in the affirmative and upheld the assignments. Under this decision the trustees are bound to pay this income to the assignees. They cannot pay it to the petitioner.

Besides the statute provides for its taxability to the beneficiaries to whom the trustees under the Court decree are bound to distribute it and not to petitioner who under the Court decree cannot get it. *Section 219 (b) (2)* of both the *Revenue Acts of 1924 and 1926* (p. 11 Brief in opposition) reads in the applicable part as follows:

> "There shall be allowed as an additional deduction in computing the net income of the estate or trust the amount of the income of the estate or trust for its taxable year *which is to be distributed currently by the fiduciary to the beneficiaries* * * * but *the amount so allowed as a deduction shall be included in computing the net income of the beneficiaries whether distributed to them or not.*" (Italics ours.)

If your Honor has an annuity and assigns it today to A, certainly you cannot be taxed on it in future years. The situation is analogous in the case at bar. See *Commissioner v. Field, 42 F. (2d) 820,* at page *822.* Or if you now have the right to receive for the rest of your life the income of the largest estate in America you have a present right which you can sell at once (so stated in *Com. v.*

Field, 42 F. (2d) at page *822)*, if you can find a buyer, assuming that, as the Illinois Court has held in the case at bar, there are no restrictions on its alienation. You may also give it away, and if you do the gift is subject to a gift tax, its value being computed on mortality tables. *Continental Illinois Bank & Trust Company v. Commissioner, 29 B. T. A. 945.*

Furthermore, the case at bar is directly in conflict with *Commissioner v. Field, 42 F. (2d) 820 (C. C. A. 2nd).* When the question at bar first came before the Board of Tax Appeals in *Edward T. Blair, 18 B. T. A. 69,* the Board was unable to distinguish it from the *Field case* and after citing and quoting from its decision in the *Field* case, it said at page *75:*

"We regard this case as controlling here".

The Commissioner appealed to the Circuit Court of Appeals for the Seventh Circuit and that Court in *Commissioner v. Blair, 60 F. (2d) 340,* said at page *342:*

> "The only question presented for our determination is whether the law will permit the trust income devised to respondent by his father's will to be assigned by him *prior to his actual receipt of it. If this question be answered in the affirmative, the ruling of the Board is correct;* if it be answered in the negative respondent is properly chargeable with the taxes assessed, and the cause must be reversed." (Italics ours.)

The Court then proceeded to answer the question in the negative and hold that the income could not be assigned. Subsequently the Appellate Court of Illinois, in *Blair v. Linn, 274 Ill. App. 23,* held that the Circuit Court of Appeals had given the wrong answer under the Illinois law and it did answer the question in the affirmative. This decision, as the Circuit Court of Appeals recognizes in the

case at bar, is binding on it by virtue of *Freuler v. Helvering, 291 U. S. 35.* Although the Appellate Court of Illinois had said that the question was whether the petitioner could assign the income *prior to his receipt of it* and had answered it in the affirmative, yet the Circuit Court of Appeals in the case at bar, after saying that this answer is binding on it proceeds to hold contrary thereto and reverses the well considered opinion of the Board of Tax Appeals, reported in *31 B. T. A. 1192,* saying in *83 F. (2d)* at page *662:*

> "The income was not even subject to his disposition until he received it".

This is exactly what it held the first time the case was before it and directly contrary to the subsequent decision of the Illinois Court.

The Circuit Court of Appeals makes no attempt to distinguish the decision of the Second Circuit in *Commissioner v. Field, 42 F. (2d) 820,* but says in *83 F. (2d) 660,* the question was "an analogous question" to that in this case.

After stating that it is bound by the decision of the Appellate Court of Illinois as to validity of the assignments it says that the question is not one of the validity of the assignments but "it is one involving the date when the income became transferable."* And then goes on to say,

> "the son's interest was therefore not in any way attached to the *corpus* of the estate that produced the income. *The income was not even subject to his disposition until he received it.*" (Italics ours.)

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* The question really was whether petitioner owned the income at any time during the taxable year. If not he could not be taxed thereon. **Hoeper v. Wisconsin, 284 U. S. 206.**

As we have pointed out, the Appellate Court of Illinois stated that the question before it was whether the son "could assign a portion of the trust income devised to him by his father's will *before he received it*," and after stating the question answered it in the affirmative.

Although the Court below did not attempt to distinguish the decision of the Second Circuit in the *Field case* and although the Board of Tax Appeals could not distinguish it, the respondent on page 8 of his brief in opposition attempts to distinguish it on the ground that "the language of the assignment clearly indicates an intention to transfer an undivided interest in the *corpus* of the trust estate". The distinction will not stand. The instrument in the *Field case* is set forth in *15 B. T. A. p. 721.* It

> "does hereby sell, assign, transfer and set over unto the said party of the second part an undivided two-thirds *interest in all the net income* of the two-fifths of the residuary estate of Marshall Field, deceased." (Italics ours.)

Furthermore, later decisions of the Second Circuit, such as *Lowery v. Helvering, 70 F. (2d) 713,* and *Shanley v. Bowers, 81 F. (2d) 13,* at page *15,* show that the decision of the Circuit Court of Appeals for the Second Circuit was not put on any such ground. See also *Helvering v. Matchette, 81 F. (2d) 73,* in which this Court at the last term denied the Government's petition for *certiorari.* The Government in its brief in opposition on page 9 states that in New York "an assignment of all of the income, without more, is effective to transfer the interest of the assignor in the *corpus*". The law of Illinois is the same. See *Binns v. LaForge, 191 Ill. 590,* cited by the Circuit Court of Appeals for the Second Circuit in the *Field case.*

In *Lowery v. Helvering, 70 F. (2d) 713,* it is said at page *714:*

> "In England for over a century the bare gift of the income of property has ordinarily passed the 'general property' to the donee".

In *Ingersoll v. Coran, 211 U. S. 335,* this Court said at page *368:*

> "In *Walker v. Brown, 165 U. S. 654,* it was held that every express executory agreement in writing, whereby the contracting parties sufficiently indicate an intention to make some particular property, real or personal, or fund, therein described or identified, a security for a debt or other obligation, creates an equitable lien on the property so indicated."

Under the law of Illinois as stated by the Court of Appeals for the Second Circuit in *Commissioner v. Field, 42 F. (2d) 820,*

> "so far as we know it is universally true that the law considers an equitable interest for life or for a term of years as present property alienable like any other. * * * The law of Illinois is the same."

The brief in opposition attempts to justify the decision below on the ground that

> "the Court below held that the opinion of the Illinois Appellate Court required the conclusion that the assignments made by petitioner were not of a share in the *corpus,* but only of specified amounts payable out of the income as he received it."

If the Court below had made any such holding, it would have misconstrued the opinion of the Illinois Appellate Court, but it made no such holding. Instead of holding that the Appellate Court's opinion required this conclusion it squarely said in *83 F. (2d) 655,* at page *662,* that the Twentieth paragaph of the Will required this conclu-

sion. As we have pointed out, the Appellate Court of Illinois construed the Will otherwise .

The question of the effect of assignments of income on income taxes and the validity thereof has recently received the consideration of the House of Lords in the case of *Inland Revenue Commissioners v. Duke of Westminster*, decided May 7, 1935, published in *L. J. R. 104*, at page *383*, and the Court is referred to the opinions of Lord Tomlin, Lord Russell of Killowen, Lord MacMillan and Lord Wright. In that case it was held that the money assigned should be excluded from the taxpayer's income.

The writ of *certiorari* should be granted in the case at bar, for if the decision below is upheld the taxpayer who has years before executed irrevocable, valid assignments, can find himself confronted with an income tax which exceeds his annual income.

All of which is respectfully submitted.

JOHN E. HUGHES,
First National Bank Bldg.,
Chicago,
Amicus Curiae.